



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

March 19, 1998

Mr. Eric M. Bost  
Commissioner  
Texas Department of Human Services  
P.O. Box 149030  
Austin, Texas 78714-9030

OR98-0762

Dear Mr. Bost:

You have asked whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 112886.

On September 24, 1997, the Texas Department of Human Services (the "department") received a request for the following information:

- (1) Any and all correspondence to or from Larry Temple.
- (2) Any and all correspondence to or from consultants to [the department] regarding suggested finalists for the executive director's position.
- (3) Any and all correspondence within the agency that mentions Larry Temple.
- (4) Any and all correspondence to or from Bill Hammond in which Larry Temple was mentioned.

The department hired The Oldani Group ("Oldani") to conduct a nationwide search to fill the position of commissioner of human services. In response to the September 24, 1997 request, you indicate that the department asked for, and received, from Oldani the resumes of candidates. These resumes were provided to the requestor. The department also informed the requestor that while Oldani possessed other responsive information, the company believed it was not required to provide this information to the department. The department informed the requestor that it had provided copies "of everything we have that is responsive to your request."

On November 18, 1997, the requestor renewed her request for records and asked the department to seek a ruling from this office as to whether records held by Oldani are subject to the Open Records Act. On November 24, 1997, the requestor again renewed her written request for these records. The department received another letter from the requestor on November 26, 1997, in which the requestor again renewed her previous request and also explained that her request specifically includes the candidate search information held by Oldani. For purposes of this ruling, we assume that the letter that was received on November 26, 1997 was a clarification of the prior requests, so that the department timely sought a request from this office when the requestor made clear what type of information was sought. *See Gov't Code* § § 552.301(a) (governmental body must seek decision from attorney general within ten business days of request), .302 (failure to timely seek decision results in presumption that information at issue is public).

You seek a decision from this office concerning the candidate search information held by Oldani. You state that the department does not have this information and that Oldani "has refused to voluntarily provide the department" with the requested information. Your letter to this office states that while the department expresses no opinion on whether the information is subject to the Texas Open Records Act, "the department does not have the information and, thus, cannot release it." You also cite to section 552.305 of the Open Records Act, which provides that in cases where a third party's privacy or property interests may be at issue a governmental body may decline to release the information for the purpose of requesting a decision from the attorney general.

As provided by section 552.305 of the Open Records Act, this office provided Oldani the opportunity to submit reasons as to why the information at issue should be withheld from disclosure. Oldani argues that the information at issue is not subject to the Open Records Act, asserting that the records are not held by the department and that the department does not have a right of access to the information. In a letter to this office, the Oldani attorney explains that the department has no copies of the candidate search information Oldani developed for the department:

[i]n this case The Oldani Group made information it developed available to the members of the board during the time the board was engaged in the selection process. Copies of information were provided directly to board members. No copies were provided to staff. At the end of each meeting at which the information was considered, the copies were required to be returned by the board members to the representatives of the Oldani Group.

Oldani, through its attorney, submitted to this office for purposes of review only, the information at issue. Oldani submitted to this office a brochure that contains candidate resumes, which have already been provided to the requestor, in addition to other information

pertaining to the candidates and the interview process. Oldani also argues that even if the brochure is subject to the Open Records Act, it is protected from disclosure pursuant to section 552.110 of the Government Code.<sup>1</sup>

We first address the question of whether the brochure is subject to the Open Records Act. Oldani asserts that the contract between the department and the company restricts the department's access to project records for audit purposes only. Article VIII of the contract provides that the department "shall have access to any books, documents, papers, and records of the Contractor which are directly pertinent to this specific contract for the purpose of making audit, examination, excerpts, and transcriptions." However, Article XII of the contract provides that the contract "is governed by and shall be construed in accordance with the laws of the State of Texas." The Open Records Act, which is a law of the State of Texas, generally governs disclosure of information that fits within the section 552.002 definition of public information.<sup>2</sup>

Section 552.002 provides that information is generally public and subject to the Open Records Act if it is collected, assembled, or maintained (1) by a governmental body under a law or ordinance, (2) by a governmental body in connection with the transaction of official business, or (3) for a governmental body and the governmental body owns the information or has a right of access to it. Since the department and Oldani both assert that the department does not have physical possession of the information, but Oldani clearly collected and assembled the information for the department, the question is whether the department owns the information at issue or has a right of access to this information. We note here that whether the department has physical custody of a document or professes an inability to obtain the document from its contractor is not determinative of whether the document is subject to the Open Records Act. Open Records Decision No. 485 ((1987) at 7 (concluding that governmental body had right of access to report not physically held by governmental body but which was "disclosed orally to the Board").<sup>3</sup>

In Open Records Decision No. 585 (1991), this office addressed a situation where a city hired a private firm to provide services in connection with the selection of a city manager. The private search firm wished to keep confidential a list of applicants for the

---

<sup>1</sup>Since the resumes have already been provided to the requestor, the only information at issue is the remaining information in the brochure.

<sup>2</sup>We note that a governmental body may not agree that information is confidential unless the governmental body has specific statutory authority to do so. JM-672 (1987); Open Records Decision No. 514 (1988).

<sup>3</sup>In Open Records Decision No. 485 (1987) at 7, this office stated that to determine that information is outside the scope of the Open Records Act because the governmental body does not physically have the records "would afford governmental bodies a ready means of circumventing the intent of the act."

position. *Id.* To permit the firm to offer confidentiality to prospective applicants, the firm maintained the information, and the city asserted that it did not have a right of access to the information. *Id.* at 1. This office concluded that the information was public, and that the city did have a right of access to the information compiled by its agent. *Id.* Further, the city could not authorize the firm to keep information confidential if the city itself could not keep the information confidential. *Id.* at 2.

In this situation, Oldani created the brochure at the direction of the department, for the department, and was paid with public funds for the work. The brochure was not independently compiled by Oldani. The brochure was compiled by Oldani acting as an agent for the department in the applicant search. Thus, we conclude that for purposes of section 552.002, the department has a right of access to the brochure. This, however, does not end our inquiry. Oldani, through its attorney, alternatively has asserted that the information at issue is protected from disclosure pursuant to section 552.110 of the Government Code.

Section 552.110 provides an exception for two types of information: (1) trade secrets, and (2) commercial or financial information that is obtained from a person and made privileged or confidential by statute or judicial decision. Oldani argues that the brochure is commercial information that is excepted from disclosure under the second prong of section 552.110.

In Open Records Decision No. 639 (1996), this office announced that it would follow the federal courts' interpretation of exemption 4 to the federal Freedom of Information Act when applying the second prong of section 552.110. In *National Parks and Conservation Association v. Morton*, 498 F.2d 765 (D.C. Cir. 1974), the court concluded that for information to be excepted under exemption 4 to the Freedom of Information Act, disclosure of the requested information must be likely either to (1) impair the government's ability to obtain necessary information in the future, or (2) cause substantial harm to the competitive position of the person from whom the information was obtained. *Id.* at 770. A business enterprise cannot succeed in a *National Parks* claim by a mere conclusory assertion of a possibility of commercial harm. Open Records Decision No. 639 (1996) at 4. To prove substantial competitive harm, the party seeking to prevent disclosure must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure. *Id.*

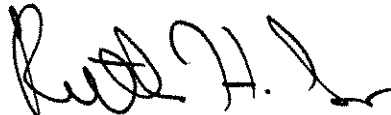
Oldani asserts that at least one other state is conducting a similar search for candidates and also that multiple searches for similar positions "will occur every year." The Oldani brief to this office indicates that the company may recommend some of the individuals not chosen for the Texas position for similar positions in other states. Oldani's brief states that if other search firms "have access to the evaluations and recommendations of the Oldani Group, they will have a competitive advantage they might not otherwise have had" against Oldani in these other, similar candidate searches.

We agree that Oldani has demonstrated that it faces competition and that substantial competitive injury would likely result from disclosure of some of the information in the brochure. As previously noted, the candidates' resumes showing their current positions and prior employment have already been disclosed. Also, portions of the brochure are geared specifically for the department's needs and this particular candidate search, such as recommendations for interview questions for this position, job offer issues and options for this position. However, relying upon Oldani's argument that it faces competition in similar searches for which Oldani may recommend the same candidates, the candidate profiles must be withheld under section 552.110, since these profiles may be used to determine candidate rankings for other, similar positions.

We also note that sections 552.024 and 552.117 may be applicable to information about Eric Bost and Terry Trimble. Sections 552.024 and 552.117 provide that a public employee or official can opt to keep private his or her home address, home telephone number, social security number, or information that reveals that the individual has family members. If this type of information is contained in any portion of the brochure, sections 552.024 and 552.117 may be applicable to keep this type of information confidential.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,

A handwritten signature in black ink, appearing to read 'Ruth H. Soucy', with a stylized flourish at the end.

Ruth H. Soucy  
Assistant Attorney General  
Open Records Division

RHS/ch

Ref.: ID#112886

cc: Ms. Polly Ross Hughes - Reporter  
Houston Chronicle  
1005 Congress Avenue, Suite 770  
Austin, Texas 78701  
(w/o enclosures)

Mr. C.Robert Heath  
Bickerstaff, Heath, Smiley, Pollan, Kever & McDaniel, L.L.P.  
816 Congress Avenue, Suite 1700  
Austin, Texas 78701  
(w/enclosure)